IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

257 *

UNITED STATES OF AMERICA, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO AFFIRM

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* Together with No. 258, *Interstate Commerce Commission v. Central Vermont Railway, Inc., et al.*, and No. 266, *United States of America v. Central Vermont Railway, Inc., et al.*

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Opinions Below

The opinion of the United States District Court for the District of Vermont is reported at 182 F. Supp. 516, and is set forth in Appendix A to this motion. The report of the Interstate Commerce Commission dated May 7, 1958, is reported at 303 I.C.C. 743, and that report and the orders of the Commission, dated May 7, 1958, and March 11, 1960, are set forth in Appendix B hereof.

* Together with No. 258, *Interstate Commerce Commission* v. *Central Vermont Railway, Inc., et al.*, and No. 266, *United States of America* v. *Central Vermont Railway, Inc., et al.*

Statute Involved

The pertinent provisions of the Interstate Commerce Act are contained in Sections 1(1), 1(2), 1(5) and 3(1) thereof, 49 U.S.C. 1(1), 1(2), 1(5) and 3(1), and are set forth in Appendix C hereof:

Question Presented

Throughout the proceedings before the Interstate Commerce Commission, as well as before the District Court, the appellees took the position that the Commission lacked jurisdiction to deal with the complaints filed with it because they assailed a combination of rates on traffic from origins in Canada to destinations in the United States, consisting of proportional rates published by individual Canadian railroads for application from Quebec origins to the ports of entry and interchange points within the United States, three and five miles from the international border, and the separately established domestic rates published by the United States railroads from such ports of entry and interchange points to the destinations.

The District Court held that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate".

The basic question is, therefore, does the Interstate Commerce Commission have jurisdiction in this instance merely because the combinations of rates were made over United States ports of entry a few miles within the United States instead of over the exact boundary line. Stating the question another way, does the purely incidental handling of international traffic by a Canadian railroad from

the international boundary to a United States port of entry or interchange point adjacent to the international border, solely for the purpose of delivering the traffic at such point to an American railroad for transportation within the United States, constitute such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate.

Statement of the Case

This proceeding is the outgrowth of five complaints filed with the Interstate Commerce Commission, each of which assailed *combination rates* and charges applicable on carload shipments of asbestos from Quebec origins to Carolina destinations, alleging them to be unjust and unreasonable and unduly preferential and prejudicial, in violation of Sections 1 and 3, respectively, of the Interstate Commerce Act. The prayer of each complaint asked the Commission to require the defendant railroads to establish just and reasonable rates for future application on such shipments and to award reparation on past shipments.

In its report (Appendix B) the Commission found the assailed rates "insofar as the transportation took or takes place within the United States" were and are unjust and unreasonable to the extent that they exceeded and exceed specific rates set forth therein. The Commission further found that the rates on the various kinds of asbestos from the Canadian origins to the American destinations involved in the complaints, "insofar as the transportation takes place within the United States", are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in other destination states, including Pennsylvania, to the extent that the combination rates to the Carolina destinations exceed or may exceed the joint rates to Ambler, Pa., and destinations taking the Ambler basis of rates, by the specific amounts set forth therein. The Commission further found the complainants

were damaged and entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the basis found in the report to have been just and reasonable.

The *combination rates* assailed each consisted of two factors, a Canadian factor and an American factor. In each instance the Canadian factor was a single line rate published either by the Quebec Central Railway Company, a Canadian railroad, for application on the involved commodities from origins in Quebec on that railroad to Newport, Vt., a United States port of entry, and also the point nearest the exact international boundary where that Canadian railroad interchanges traffic with its American connection, or by the Canadian National Railways, likewise a Canadian railroad, for application on the involved commodities from Quebec origins on that railroad to East Alburgh, Vt., another United States port of entry and also the point nearest the exact international boundary where that Canadian railroad interchanges the traffic with its American connection. The American factor in all instances was a rate published to apply from Newport or East Alburgh, Vt., to the Carolina destinations involved.

East Alburgh and Newport, Vt., the points where the Canadian railroads turn the cars over to their American railroad connections, are three and five miles, respectively, south of the international boundary. As ports of entry, those points are also places where Customs inspection of incoming railroad freight is made and, as such, are for all practical purposes border points.

The individual Canadian railroads which publish the single line Canadian factors alone control the measure of those rates. No American railroad had any voice in the publication of those rates or in fixing the level thereof. The American lines alone control the measure of the American factors. Neither the Quebec Central nor the Canadian National Railways had any voice in the establishment of those rates or in fixing the level thereof.

For those reasons, from the very beginning of this litigation the appellees have steadfastly contended that Newport and East Alburgh, Vt., were, for all practical purposes, international border points adjacent to the international boundary. They have contended that only the American factors applicable from those points to the Carolina destinations and the transportation under those rate factors are subject to the jurisdiction of the Commission. They have further contended that for those reasons the complaints filed with the Commission, which did not put in issue the lawfulness of the American factors, assailed rates not within the purview of the Interstate Commerce Act, and consequently beyond the jurisdiction of the Commission.

A. The Commission Decision

The report of the Commission dealing with the jurisdictional contention of the appellees reads in part as follows:

> "The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.
>
> "Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear alternative with respect to their participation in international traffic. They may publish

rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15. We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.

"The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

"While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary." (Appendix B, pp. 57, 58)

And:

"The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect

the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication". (Appendix B, p. 60)

B. The District Court Opinion

Recognizing the jurisdictional question raised by the railroads as the crux of this case, the District Court decision stated at the outset:

> "A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?" (Appendix A, p. 30)

It noted (Appendix A, p. 33) that the appellees' argument before that Court was "confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas".

It cited those parts of the Interstate Commerce Act here pertinent and stated that, as the Commission itself had emphasized in its decision:

> "• • • it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into

joint rates for international transportation. See *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U. S. 654, 660 (1931); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, 523 (1932); *International Nickel Co.* v. *Director General*, 66 I.C.C. 627 (1922). However, it is equally well settled that the Commission does have power to pass upon the legality of existing joint rates on international transportation, and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation 'only insofar as such transportation * * * takes place within the United States.' See *Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 I.C.C. 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co.* v. *Director General*, 66 I.C.C. 627 (1922). The Supreme Court has upheld the Commission's interpretation in two cases, *News Syndicate Co.* v. *New York Cent. R. Co.*, 275 U. S. 178 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U. S. 654 (1931)." (Appendix A, pp. 34, 35)

The District Court then pointed out that the rates which the Commission found unreasonable and prejudicial in its report were not *joint* rates, but *combination* rates; that the Commission does not dispute the appellees' statement that there are no facilities for the interchange of railroad freight available between the international boundary and East Alburgh and Newport; that the Commission does not dispute the fact that, as to shipments moving under the assailed *combination rates*, the Canadian carriers op-

erate within the United States only for the purpose of turning the shipments over to the American carriers; and that the Commission nevertheless held that it had power to review the entire transportation charge because the interchange occurred within the United States.

The District Court concluded to annul and set aside the Commission's orders for four reasons.

1. The District Court observed that "although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada". The District Court conceded (Appendix A, p. 38) that the Commission need not make that distinction when a *joint* rate is involved, but stated that was not so where the *American* railroad and the *foreign* railroad each publishes a rate to and from "a border point where interchange occurs". The Court then stated: "In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase 'but only insofar as such transportation takes place within the United States' will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country".

2. The Court stated that it would follow from court approval of the Commission action that "in situations

where the *foreign factor* is the unreasonable factor *American carriers* will be held liable for a portion of overcharges that they had no part in formulating".*

3. The Court stated the Commission was in error, "when, in its decision in the instant case, it stated that its prior holdings support its present position". The Court pointed out (Appendix A, p. 39) that "not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review *the foreign factor of a combination international rate*".* In doing so, the Court dealt analytically with a number of Commission decisions, for example with *Hoffman-Taff, Inc.* v. *St. Louis S. F. R. Co.*, 279 I.C.C. 710 (1950), and quoted from that decision as follows:

> "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, *which for all practical purposes are international border points*, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction."*

The Court then said:

> "* * * the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the

* Italics added.

Commission, without a strong showing to justify departure. *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 395-97 (1956); *FTC* v. *Bunte Bros.*, 312 U. S. 349, 351-52 (1941)."

4. The District Court rejected as unpersuasive the Commission argument that unless the Court accepted its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points.

Argument

Each of the complaints filed with the Interstate Commerce Commission, which the appellees contend is defective on its face, assails *combination rates* made over United States ports of entry adjacent to the international boundary "which for all practical purposes are international border points". Each of the complaints challenges the lawfulness of the total rates and charges applicable on asbestos shipped from origins within Canada to destinations within the United States. None of the complaints assails the lawfulness of the American factor, applicable wholly within the United States from the United States ports of entry, "which for all practical purposes are international border points", to destinations within the United States.

As the District Court stated, and as the report of the Commission itself freely recognized, it has long since become well settled law that American railroads have a clear alternative when they participate in the transportation of international traffic. They may publish rates applicable to and from the border, in which event they are answerable only for the lawfulness of those rates, or they may participate in *joint* international rates, in which event they become jointly and severally liable for any unlawfulness found in those rates.

If the rates assailed before the Commission had been *joint* rates, the possibility that either this Court or the District Court would have been called upon to review the Commission action with respect thereto is extremely remote. In this instance the American railroads elected not to participate in *joint* rates. In lieu thereof they published rates for application from United States ports of entry "which for all practical purposes are international border points" to the Carolina destinations. That election, the appellees respectfully submit, limits the jurisdiction of the Commission to a consideration, in proper proceedings, of the rates and charges fixed by the American factors alone. However, what the Commission has here done in effect is to treat the assailed combination rates as though they were in fact *joint* rates, apparently on the ground that the Canadian factors obligated the Canadian railroads "to provide substantial transportation service within the United States" and consequently may not be said to conform to the first of the two alternatives available to American railroads participating in the transportation of international traffic.

The Commission's power over transportation wholly by railroad is derived from the statute, the pertinent portions of which are set forth in Appendix C. Those provisions give the Commission authority over common carriers engaged in the transportation of property and over the transportation of property insofar as such transportation takes place within the United States. The appellees respectfully submit that the law with respect to the limitation of the Commission's power is clear, having been dealt with particularly in two cases decided by this Court.

News Syndicate Co. v. *N. Y. C. R. R.*, 275 U. S. 179, was a reparation case only and involved *joint* international rates. It did not involve rates for the future. The question there was whether or not the Commission had jurisdiction on a complaint made against United States rail-

roads alone to determine the reasonableness of a joint rate applicable from an origin in Canada to a destination in the United States. This Court there held that the Interstate Commerce Act applied to the lines that carried and to the transportation of the traffic from the international border to the destination there involved; that it was the duty of the United States railroads to establish just and reasonable rates for that service, which they had failed to do; that their failure to do so contravened the provisions of the Act and compelled the complainant before the Commission to pay the through charges complained of; and that the Commission had jurisdiction to determine whether the complainant was entitled to an award of damages, and, in the ascertainment of damages, jurisdiction to determine the reasonableness of the charges exacted. Since the Court held that the breach of the carriers' statutory duty to do so was the proximate cause of the complainant's injury, it seems fairly certain that this Court would have ruled exactly to the contrary had the United States railroads published and maintained rates applicable from the international border in that case.

Lewis, etc. Co. v. *Southern Pac. Co.*, 283 U. S. 654, also was a case involving reparation only. There the United States railroads had published and maintained rates on the involved traffic from the international border to a destination within the United States. However, that rate was not applicable on the international traffic involved in that proceeding. This Court accordingly held, as it had in the *News Syndicate* case, that the Commission had jurisdiction to determine the reasonableness of the *joint* international rate which actually applied on the traffic involved in that case. However, this Court there held that the Interstate Commerce Act does not empower the Commission to prescribe or regulate *joint* international rates, but that it applies to international commerce only insofar as the transportation takes place within the United States. It held that the Act applied to the transportation of the

traffic there involved from the boundary to destination, and required the defendant to establish just and reasonable rates for that service, rendering the defendant liable for damages resulting from its failure to do so.

The Commission itself has repeatedly cited either or both of those cases for the proposition that the United States railroads have a clear alternative of either publishing rates to and from the international border, in which event they are answerable only for the lawfulness of those rates, or of participating in *joint* rates, in which event they become jointly and severally liable for the lawfulness of those *joint* rates.

For more than forty years the Commission has held in effect that its jurisdiction over international traffic attaches at ports of entry or exit within the United States. Throughout that entire time, except in the single instance which is the cause of this litigation, where international traffic moved on *combination rates* made up of factors applicable to ports of entry or interchange points on or adjacent to the international border, the Commission has refused to construe the statute as conferring jurisdiction upon it over the transportation between the international border, on the one hand, and the ports of entry or exit or interchange points on or adjacent to the international border, on the other. It has consistently exercised jurisdiction in such cases only over that portion of the transportation covered by *the American factors of combination rates applicable wholly within the United States.* It has consistently refused to take jurisdiction over the *Canadian factor* even though that factor of the *combination rate* obligated the *Canadian* railroad to handle the traffic to or from the United States port of entry or exit.* Even in *joint* rate situations the Commission has refused to take jurisdiction over Canadian railroads, and the transporta-

* Appendix D hereof is a list of such cases.

tion they performed, when those railroads interchanged the traffic at points within the United States on or adjacent to the international border.*

Such has been the interpretation of the statute with respect to the matter of jurisdiction by the Commission itself, and for more than forty years the railroads have relied upon that construction and interpretation of the statute, as they had an absolute right to do. As the District Court said (Appendix A, p. 41), that consistent interpretation ought not to be set aside either by the courts or by the Commission without a strong showing to justify a departure therefrom.

No substantial reason has been advanced by any of the several appellants which warrants or justifies a reversal by this Court of the judgment of the District Court.

What each of the appellants has overlooked or failed to comprehend is the fact that the Commission either had jurisdiction to consider the issues raised by the complaints filed with it, or it did not. If the publication of rates to and from East Alburgh and Newport, Vt., "which for all practical purposes are international border points" amounted in effect to the publication of rates to and from the border, which would be in harmony with all prior holdings of the Commission in similar cases, and in this instance represent the adoption by the American lines of the first alternative available to them in handling international traffic, the Commission clearly was without jurisdiction to consider the complaints filed with it.

However, the holding to that effect by the District Court does not, as the appellants contend, strip the Commission of power to prevent undue preference and prejudice in the transportation of international traffic insofar as such transportation takes place within the United States. The effect of the decision in the District Court is to require complaints in instances such as those here in-

* Appendix E hereof is a list of such cases.

volved to assail the American factor applicable to or from border points. In such cases if the assailed American factors are shown to be unjust, unreasonable, unduly prejudicial or preferential by comparison with other rates, the Commission has both the jurisdiction and the authority to deal with such situations, just as it does in the case of ordinary complaints alleging violations of Sections 1 or 3 of the Interstate Commerce Act, or both.

Admittedly, the principal purpose of the Interstate Commerce Act was to prevent unlawful discrimination, prejudice, and preference, but the statute grants the Commission power to deal with unlawfulness only insofar as transportation takes place within the United States. Stated another way, admittedly the statute empowers the Commission to deal with alleged violations of Sections 1 and 3 of the Act. However, the jurisdiction of the Commission to deal with such allegations in the case of international traffic depends entirely on whether the traffic moves under *rates applicable to or from the international border*, or under *joint international rates*. If the traffic moves under *combination rates made over international border points*, the American railroads are answerable only for the lawfulness of those rates, and the jurisdiction of the Commission is limited to a consideration of complaints directed to the lawfulness of the American factors alone. If the traffic moves under *joint international rates*, the American railroads automatically become jointly and severally liable for the lawfulness of those rates, but, even in those instances, the jurisdiction of the Commission is limited to that portion of the transportation which takes place within the United States.

It may be well settled, as the Solicitor General contends it is, that when carriers enter into *joint* rates for the transportation of goods from a common originating point to certain destinations but fail to provide *joint* rates to other destinations to the prejudice of the latter, the Commission has authority under Section 3 to order the dis-

crimination ended even where the particular rates involved are not in themselves unreasonable. But that is so only when the allegedly unlawful rates are subject to the jurisdiction of the Commission, and that is not the case here.

Before the Commission can require undue prejudice or preference ended under the authority conferred upon it by Section 3 of the Interstate Commerce Act, it must have jurisdiction over the rates alleged to be unlawful. The appellees respectfully contend that, in this instance, the Commission lacks that jurisdiction. And, contrary to the contention of the Solicitor General, the right of shippers, communities, and entire regions to be free from discrimination and undue prejudice in the transportation of international traffic will not be beyond the reach of Commission control. In a proper proceeding dealing only with the lawfulness of rates published to or from the international border, the Commission would have jurisdiction to consider and authority to require the removal of any unlawfulness found to exist in such rates, whether the unlawfulness be due to unjustness and unreasonableness or to undue preference and prejudice. In such an instance, however, the Commission clearly would have no authority to remove any alleged unlawfulness, whether it be said to result from the unjust and unreasonable nature of the rates or the prejudicial and preferential nature thereof, in any instance where the alleged unlawfulness necessarily resulted from the applicability of the factor published by *Canadian* railroads for application between the international border and origins or destinations within Canada.

The crux of this matter has to do with the jurisdiction of the Commission. The question is whether the Commission had jurisdiction to deal with the issues sought to be raised by the complaints filed with it. The appellants contend that, even if the Commission is without power to determine whether the *combination rates* from the *Cana-*

dian origins to the Carolina destinations are just and reasonable, the Commission nevertheless must have jurisdiction by virtue of Section 3 to determine whether those *combination rates* are unduly prejudicial. Clearly, this contention is without substance and completely lacking in legal significance.

In referring to the statement by the District Court of the single question presented to it, the Commission argues that, while that question may be relevant in determining the validity of the Commission's finding that the assailed rates are unjust and unreasonable, it has no relevance to the Commission's separate finding that the assailed rates created undue prejudice and preference on the ground that the District Court opinion contained "no discussion of the Section 3(1) issue". In discussing that contention, the Commission, like the Solicitor General, simply failed to recognize that the basic issue in this case has to do with the jurisdiction of the Commission. Either the Commission had jurisdiction to consider and dispose of the complaints before it or it did not. If it lacked jurisdiction to consider the complaints, it was just as lacking in jurisdiction to deal with allegations of undue preference and prejudice as it was in jurisdiction to deal with allegations charging unjustness or unreasonableness. The answer to the contentions of both the Solicitor General and the Commission is that the Commission's authority to eliminate undue preference and prejudice exists only when the rates assailed and the transportation provided thereunder are subject to the jurisdiction of the Commission.

Contrary to the contention of the Commission, whether it was without jurisdiction to determine whether the combination rates from Canadian origins to Carolina destinations were just and reasonable was not an entirely separate question. The appellees have consistently contended, and the District Court in effect found, that the *Canadian* factors were simply rates from Canadian origins to the United States ports of entry adjacent to the international

border, and the *American* factors were simply rates from those border points to the Carolina destinations of the shipments. The *American* railroads were answerable only for the lawfulness of the rates applicable from the border points to the Carolina destinations, and the jurisdiction of the Commission was limited to a consideration of the lawfulness of the rates for which the *American* railroads were answerable, and the transportation provided thereunder. In the absence of a proper proceeding assailing the lawfulness of those factors, the Commission had no jurisdiction or authority to determine whether the total rates and charges here assailed were just and reasonable, just as it was without jurisdiction or authority to determine whether they resulted in undue prejudice to the complainants. What the Commisison obviously attempted to do here, as the District Court pointed out (Appendix A, p. 37), was to admit its lack of extra-territorial jurisdiction, and then proceed to exercise jurisdiction over the entire transportation and the total rates and charges.

The Commission argues that it did not rest its jurisdiction upon the mere form of the rate publication, but on the ground that it had "jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication". It argues that the rates maintained by the *Canadian* lines obligate those carriers to provide substantial transportation service within the United States. But even in its jurisdictional statement, the Commission fails, as it did in its report and in its briefs and arguments before the District Court, to indicate what "substantial transportation service within the United States" the *Canadian* lines were obligated to perform in these instances, which they were not likewise obligated to perform in all the prior cases in which the Commission construed its jurisdiction as being limited to a consideration of the *American* factors only. The Commission argues that the conclusion of the District Court that "the fact that interchange occurs a

few miles on one side of the boundary as opposed to a few miles on the other side is a fortuitous event, an event upon which Congress would hardly have intended the Commission's jurisdiction to hinge" is a doctrine of *de minimis* which is inconsistent with the basic jurisdictional definitions of Sections 1(1)(a) and 1(2). But in cases involving combination rates made over United States ports of entry or exit adjacent to the international border, the Commission itself for more than forty years refused to consider the transportation between the international boundary and the port of entry or interchange point to be such transportation as to give it jurisdiction over the foreign factor of the combination rate. As the District Court emphasized,

> "We merely hold that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate." (Appendix A, pp. 42-3)

The simple fact of the matter is that the transportation service which the *Canadian* lines were obligated to provide was as unsubstantial as the argument which the Commission is here offering in support of its alleged jurisdiction.

Finally, the Commission argues that the District Court's conclusion above quoted is inconsistent with its concession that "If * * * the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction". An inconsistency would result only if the two situations were analogous. But they are not. The trackage the Court referred to is located wholly within the United States, and an analogous rate situation would be a rate factor applying from the precise boundary to Newport or

East Alburgh. However, as the Court below observed:

> "We gather * * * that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange." (Appendix A, p. 37)

In other words, the jurisdiction which the Commission has taken over the *Canadian* rate factor embraces transportation which takes place entirely in Canada except for a 3 and 5 mile haul to the border points for the sole purpose of interchange. On the other hand, the jurisdiction over the trackage referred to by the Court is confined to that located wholly within the United States.

The argument advanced by the appellants, who refer to themselves as "southern consumers", in support of their contentions that the judgment of the lower court was in error and should be reversed, are decidedly weak and equally unsubstantial.

The first two questions sought to be presented by these appellants are substantially the same as questions presented by the other appellants. Since they do not require any further comment, the balance of this motion will be addressed to the additional contentions of these appellants.

Certainly the acts of the Canadian railroads in filing the tariffs with the Interstate Commerce Commission which published the rates applicable from the Canadian origins to the United States ports of entry could not and did not confer any jurisdiction on the Interstate Commerce Commission. *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, 524; *Albany Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 245 I.C.C. 741, 744.

Nor does it avail these appellants anything to argue that they assailed the through transportation charges assessed for the transportation service from the point of

origin in Canada to the point of destination in the United States. These appellants, like the Solicitor General and the Commission, overlook or ignore the basic fact that the assailed rates were not *joint* rates but *combination* rates made over the United States ports of entry "which for all practical purposes are international border points" and, as such, made the United States railroads answerable for the lawfulness of the American factors alone. Only if these rates were shown to be unlawful in a proper proceeding could the Commission find them unjust or unreasonable in violation of Section 1 of the Interstate Commerce Act or unduly prejudicial in violation of Section 3 of that Act. Something more than the bare and erroneous contention of these appellants that the assailed rates "are in fact joint through rates", and the further contention that the fact that these "joint through rates" were constructed out of existing rates from the Canadian origins to the United States ports of entry and rates from those points to the Carolina destinations "is not of legal significance", is necessary to establish the jurisdiction of the Commission which the District Court found lacking in this instance. To argue that "the through rates involved in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, and *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, "were in fact joint through rates even though they were constructed on a so-called combination basis" does violence to the facts set forth in those decisions of this court. The decision in the *Sloss-Sheffield* case indicates (p. 231) that the rates there involved were joint rates. The decision in the *Sullivan* case indicates (p. 459) that the rates there involved were combination rates.

Actually, this court has already disposed of the argument the appellants here attempt to make. In the *Sloss-Sheffield* case, *supra*, this court stated (p. 233) that the establishment of a *joint* rate by the concurrence of all connecting carriers is necessarily the act of each because the establishment of that rate is done by their joint agree-

ment. In *U. S.* v. *Great Northern R. Co.*, 343 U. S. 562, this court said:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this court expressly has approved the Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes." (pp. 572-573)

In a related footnote (p. 572) it added:

> "It is the duty of every carrier to establish reasonable through routes but there is no corresponding duty to establish joint rates with other carriers. 49 U.S.C. § 1(4). Joint rates may be established either by agreement of the carriers, 49 U.S.C. § 6(4), or by Commission order, 49 U.S.C. § 15(3)."

There is clearly no merit to that argument.

On the contrary, whether the through rates here involved were *joint rates* or *combination rates made over international border points* is a fact of extremely important legal significance.

Had the American railroads joined in the establishment of *joint* rates, by the individual act of each participating carrier, American or Canadian defendant, they would have become jointly and severally liable thereby, and the Commission would have had jurisdiction to determine the nature and extent of the alleged unlawfulness insofar as the transportation took place within the United States. By electing not to agree to the establishment of *joint* rates in this instance, but to publish and maintain rates to and from the United States ports of entry only "which for

all practical purposes are international border points" where the traffic was interchanged between the Canadian and American railroads, the latter made themselves answerable only for the lawfulness of those rates and the jurisdiction of the Commission was limited by statute to a consideration of those rates.

The legal significance was *in fact* the crucial point in *News-Syndicate Co.* v. *N.Y.C.R.R., supra,* and *Lewis, Etc. Co. v. Southern Pac. Co., supra,* in both of which the failure of the American carriers to publish rates from the international border constituted a violation of the provisions of the Act and compelled the complainants before the Commission to pay the through charges complained of. The Court expressly held that the proximate cause of the losses complained of was the breach of the statutory duty to publish rates from the international boundary. Moreover, the distinction has been consistently recognized by the Commission as well in many cases involving combination rates made over ports of entry located on or adjacent to the international boundary. (Appendix D.) And, of course, the distinction is reflected in the two alternatives which the Commission has consistently held the railroads possess in publishing rates for application on international traffic.

Nor did the opinion of the District Court make it impossible for the Commission to determine the lawfulness, under Sec. 3(1) of the Interstate Commerce Act, of the rate adjustment complained of as discriminatory. The complainants before the Commission themselves made it impossible for the Commission to determine the lawfulness of the applicable rate adjustment by failing to assail the lawfulness of the *American factors* thereof which applied to that portion of the transportation wholly within the United States, and the only transportation over which the Commission had jurisdiction. Contrary to the contention of these appellees, the jurisdiction of the Commission

under Section 3(1) of the Act does depend upon its jurisdiction under Section 1(1) and 1(2) of the Act. The jurisdiction of the Commission is especially conferred upon it by those sections which are set forth in Appendix C hereof. The provisions of Section 1(1) and 1(2) are clearly applicable not only to Section 1 and the subdivisions thereof, but to Section 3(1) and to all other sections of that chapter or part of the Act also.

Nor does *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, support the contrary argument of these appellants. That case did not involve international traffic. It involved an allegedly discriminatory rate situation which existed between intrastate and interstate traffic, and the issue was whether or not the limiting provision of Section 1, relating to transportation "wholly within one state", limited the jurisdiction of the Commission to deal with the alleged discrimination. In that decision, the Court did not hold, as these appellants contend, that jurisdiction under Section 3(1) does not depend upon jurisdiction under Section 1(1) and 1(2), but rather that the limiting provision referred to had no application because interstate traffic was involved. The Court said:

> "The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one state'. These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved." (p. 358)

If, in the instant case, the domestic factor of the *combination rate* were assailed as being unduly discriminatory, then the limiting provisions of Section 1 would be in-

applicable as in the above case. However, the Southern Consumers assailed international rates without limitation or restriction, and sought the prescription of international rates without limitation or restriction. The statute does not give the Commission jurisdiction to prescribe or regulate such rates. *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 660.

Actually, the *Houston* case not only fails to support the appellants, but supports the contentions of the appellees. In discussing the language of Section 3, the Court there said:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described *which it was within the power of Congress to condemn.* There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce *which it had authority to reach.*" [Italics added.] (p. 356)

The contention of these appellants that, should the judgment of the District Court be permitted to stand, they would be at the mercy of the appellees and that, by the simple selection of the method of tariff publication, the appellees could destroy any business enterprise in the United States which depended upon raw materials produced in an adjacent foreign country is too preposterous to call for any reply.

Nothing in the *News Syndicate* case cited by these appellants supports their contention that "the Commission

had authority to hear the complaints under Section 13(1) of the Act (49 U.S.C. 13(1)) and under Section 16(1) of the Act (49 U.S.C. 16(1)) had jurisdiction to award damages for the violation". The rates assailed in the *News Syndicate* case were *joint* rates, not *combination* rates made over international border points.

These appellants contend that the appellees have not complied with the Act by establishing rates from the international boundary line to the Carolina destinations. The shallowness of that contention is made self-evident by the further contention of the appellants that "such would be true even if we were to consider East Alburgh and Newport, Vermont, as being points on the international boundary line", those points being the very points over which the applicable combination rates were constructed and from which the *American factors* to the Carolina destinations were lawfully published and legally applicable.

The final contention that the District Court erred when it held that the rates applicable from the Canadian mines to East Alburgh and Newport, Vt., were not subject to the jurisdiction of the Commission apparently rests entirely on the fact that those rates were published in tariffs filed with the Interstate Commerce Commission. As has heretofore been argued, the mere act of the individual *Canadian* railroads in filing such tariff schedules with the Commission conferred no jurisdiction upon it which it did not otherwise have. The fact that the *Canadian factors* were proportional rates merely had the effect of making them inapplicable on any shipment which might be consigned for local delivery at East Alburgh or Newport, Vt.

The appellees respectfully submit that the appellants have presented no substantial question for decision by this Court, and that the judgment and order of the District Court should be affirmed.

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Certificate of Service

I, J. Edgar McDonald, attorney of record for the Central Vermont Railway, Inc., et al., appellees in these proceedings, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing motion on the several parties to this action, as follows:

1. On the appellants, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company; by mailing copies in duly addressed envelopes to its attorneys of record, with air mail postage prepaid, E. B. Ussery, 608 Security Federal Building, Columbia 1, South Carolina, and John D. Carbine, Mead Building, Rutland, Vt.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and H. Neil Garson, Associate General Coun. ., Interstate Commerce Commission, Washington 25, D. C.

3. On the United States of America, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record, J. Lee Rankin, Solicitor General, Robert A. Bicks, Assistant Attorney General, Richard A. Solomon, and John J. Voortman, Attorneys, United States Department of Justice, Washington 25, D. C., and Louis G. Whitcomb, United States Attorney for Vermont, Rutland, Vt.

This 1st day of September, 1960.

J. Edgar McDonald,
466 Lexington Avenue,
New York 17, N. Y.

APPENDIX A

United States District Court, District of Vermont

CIVIL ACTION No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Argued July 9, 1959. Finally submitted on briefs, November 1, 1959. Decided March 7, 1960

Before: WATERMAN, *Circuit Judge*, FOLEY and GIBSON, *District Judges*

HORACE H. POWERS, St. Albans, Vermont; (J. Raymond Hoover, Washington, D.C.; J. Edgar McDonald, New York City; William H. Parsons, Washington, D.C.; John F. Reilly, New York City, of counsel) for Plaintiffs.

Robert W. Ginnane, General Counsel; H. Neil Garson, Assoc. General Counsel, for Interstate Commerce Commission.

Robert A. Bicks, Acting Asst. Atty. General; John H. D. Wigger, Attorney, Department of Justice, Washington,

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D.C.; Louis G. Whitcomb, U.S. Attorney for Vermont, Rutland, Vermont, for United States of America.

John D. Carbine, Rutland, Vermont; E. B. Ussery, Columbia, South Carolina (Harvey L. Golden, Joseph J. Lipton, Columbia, South Carolina, of counsel) for Interveners.

WATERMAN, *Circuit Judge*:

Ninety-one railroads[1] join in this action to enjoin and annul certain orders of the Interstate Commerce Commission,[2] entered pursuant to a decision of the full Commission reported at 303 ICC 743 (May 7, 1958). A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor in a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?

The rates in question pertain to the carriers of asbestos, a transportation originating in the Province of Quebec, Canada, and terminating at various points in North and South Carolina. The principal source of asbestos for United States manufacturers of asbestos products is a narrow belt of land in southern Quebec extending northeast and southwest approximately fifty miles west of the Maine border. Railroad appears to be the principal method of transporting this asbestos to its American

[1] Originally ninety-eight railroads joined as plaintiffs. However, on April 6, 1959, Judge Gibson issued an order permitting seven southern railroads to withdraw.

[2] Two orders are attacked. They are an Order dated May 7, 1958, that required the railroads to cease and desist from exacting rates held to be unreasonable and prejudicial in the Commission's decision of the same date; and an Order dated February 19, 1959, that amended the effective date of the May 7, 1958 order.

users. The asbestos area of southern Quebec is served by two Canadian railroads, the Canadian National and the Quebec Central. Asbestos intended for consignees in the southern-Atlantic states is carried by the Canadian lines to East Alburg, Vermont, and Newport, Vermont (points respectively 3 and 5 miles south of the international boundary) where the cars are turned over to American railroads in an "interchange" operation. Customs inspection on incoming railroad freight occurs at East Alburg and at Newport; and, to that extent at least, these towns may be regarded as border points.

The Canadian carriers have joined with American carriers in the publication of joint rates for the carriage of asbestos to points in the middle-Atlantic states and the middle-west. However, for the carriage of asbestos to the southern-Atlantic states the carriers concerned have not published joint rates but instead have published combination rates.[3] One factor of these combination rates is a proportional rate[4] pertaining to the transportation from the mines in Quebec to the Vermont points of interchange. The other factor is a local rate pertaining to the transportation from these points of interchange to the various southern destinations.

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[3] In railroad parlance a *joint* rate on a through route differs from a *combination* rate on a through route in that a joint rate is reached through an agreement of the participating carriers and each participating carrier is jointly and severally liable for the entire rate. See *Louisville and N. R.R. v. Sloss-Sheffield Co.*, 269 U.S. 217 (1925) at pp. 231-234.

[4] A *proportional* rate covers a portion of a through route and differs from a *local* rate between the same points in that the proportional rate applies only to transportation on the through route. See *Lewis-Simas-Jones Co. v. Southern Pacific R. Co.*, 283 U.S. 654, 663 (1931). Apparently the rates south of East Alburg and Newport to the Carolinas are merely local rates.

Appendix A

In 1951 Thermoid Company, Southern Division, a manufacturer of asbestos textile products, located in Charlotte, North Carolina, filed with the Commission a complaint alleging that the combination rates for the carriage of asbestos from mines located along the lines of the Quebec Central to Charlotte were unreasonable and were prejudicial in comparison with the joint rates given complainant's competitors in the middle-Atlantic states and the middle-west. As the complaint wound its way upward through the various levels of Commission adjudication, four additional complaints of a similar nature were consolidated with it.[5] In its decision the Commission accepted complainant's contentions. It held that the Quebec-Carolina rates were unreasonable and prejudicial and ordered reparation to the extent that the rates exceeded the rates for comparable distances charged complainants' competitors in the middle-Atlantic states and the middle-west.

We are, of course, without authority to consider the validity of the Commission's orders allowing reparations;[6] and plaintiffs here do not argue that the Commission's

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[5] The net effect of the consolidation was to increase the number of complainants to four so that the group then included manufacturers of asbestos products in Charlotte, Davidson and Marshville, North Carolina, and North Charleston, South Carolina and to expand the complaint so as to bring into question the rates from the mines along the Canadian National as well as those from the mines along the Quebec Central.

The four complainants in the proceedings before the Commission have intervened in this action under 28 U.S.C. § 2323.

[6] Under 28 U.S.C. § 2321 the jurisdiction of a three-judge district court extends to all orders of the Commission save those "* * * for the payment of money or the collection of fines, penalties and forfeitures * * *" Under 49 U.S.C. § 16(2) an action for the enforcement of a reparations order is to be brought by the complainant in one of several district courts or in a state court. In *United States v. ICC*, 337 U.S. 426 (1949) the Supreme Court indicated that the activities of a three-judge district court were to be carefully confined to those expressly provided for by Congress.

findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. Plaintiffs' argument before this court is confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas.

The Commission's power with respect to transportation wholly by railroad is set forth in Sections 1(1)(a) and 1(2) of the Interstate Commerce Act, 49 U.S.C. §§ 1(1)(a), and 1(2). These sections in pertinent part read as follows:

> Carriers subject to regulation
>
> (1) The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, • • •.
>
> • • • • •
>
> • • • from or to any place in the United States to or from a foreign country, *but only insofar as such transportation* or transmission *takes place within the United States.*
>
> Transportation subject to regulation
>
> (2) The provisions of this chapter shall also apply to such transportation of passengers and property • • • *but only insofar as such transportation* or transmission *takes place within the United States* • • •. [Italics supplied.]

Appendix A

As the Commission emphasized in its decision in the present case, it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into joint rates for international transportation. See *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654, 660 (1931); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520, 523 (1932); *International Nickel Co.* v. *Director General*, 66 ICC 627 (1922). However, it is equally well settled that the Commission does have power to pass upon the legality of existing joint rates on international transportation, and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation "only insofar as such transportation * * * takes place within the United States."[1] See *Black Horse Tobacco Co.* v. *Illinois Central*

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[1] Prior to February 28, 1920, Section 1(1) declared the Act to be applicable to carriers engaged in any of four types of international transportation: (1) from the United States to an adjacent foreign country; (2) from the United States through a foreign country to the United States; (3) from the United States to a foreign country when shipment is being carried from an originating point in the United States to a port of transshipment; (4) from a

R. Co., 17 ICC 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co.* v. *Director General*, 66 ICC 627 (1922). The Supreme Court has upheld the Commission's interpretation in two cases, *News Syndicate Co.* v. *New York Cent. R. Co.*, 275 U.S. 178 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654 (1931).

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foreign country to the United States when the shipment is being carried to a terminating point in the United States from a port of entry either in the United States or in an adjacent foreign country. In *Galveston, H. & S. A. R. Co.* v. *Woodbury*, 254 U.S. 357 (1920), a case decided under Section 1(1) as it existed prior to the 1920 Amendments, the Supreme Court held that transportation *from* an adjacent foreign country to the United States was within the Commission's jurisdiction under the provisions relating to the transportation from the United States to an adjacent foreign country. On February 28, 1920 (Section 400 of the Transportation Act of 1920, 41 Stat. 474) Section 1(1) was amended to apply to transportation: (1) from the United States through a foreign country to the United States, and (2) from or to the United States to or from a foreign country; but only insofar as these two types of international transportation take place within the United States. Section 1(2) quoted in the opinion, was a new section added by the 1920 Act.

There is language in *News Syndicate*, *supra*, at 186-87, and *Lewis-Simas-Jones*, *supra*, at. 663, which might be construed as indicating that the Commission would be without jurisdiction over the joint rate if the American carrier had also published a rate for the American portion of the transportation. The Commission, however, has subsequently held that it has jurisdiction ove joint rates irrespective of whatever additional rates may be filed. *Carstens Packing Co.* v. *Great Northern R. Co.*, 264 ICC 164 (1945); see also *Cyanamid and Cyanide from Niagara Falls, Ont.*, 155 ICC 488 (1929); *Publication of Rates between United States and Canada*, 147 ICC 778 (1928).

The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. The Canadian carriers published proportional rates to East Alburg, Vermont, and Newport, Vermont, the interchange points; and the American carriers published local rates for the remainder of the transportation.[9] The Commission does not dispute plaintiffs' statement that there are no facilities for interchange available between the international boundary and East Alburg and Newport. Nor does the Commission dispute that, as to shipments under the assailed combination rates, the Canadian carriers operate within the United States only for the purpose of turning over the asbestos to American carriers.[10] In its decision the Commission made no findings that the local rates south of the interchange points were unreasonable or prejudicial. The Commission, nevertheless, held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred within the United States.[10] The Commission stated its position in the following words:

> "The contentions of the defendants are based on the assumption that since Newport and East Alburgh

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[9] Because the Canadian rate is a proportional rate, it does not apply to any shipments to American consignees at points between the international boundary line and the interchange points, nor does it apply to shipments to be delivered by Canadian carriers to consignees located at the interchange points.

[10] As to those shipments where the interchange occurred at St. Johns, Quebec, the Commission held that the Canadian carrier was not liable for reparation. Apparently, however, the American carriers were liable for reparation even as to these shipments.

are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. [The Commission's reference is to publication of rates to and from the international boundary.] The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to those points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transporation takes place within the United States."

First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada."[1] It is now settled that the Commission need not make this distinction if the international transportation is conducted

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[1] In its decision in the present case the Commission states, at p. 754, that its jurisdiction here exists "regardless of the manner of rate publication." We gather this to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

on the basis of a joint rate because the American carriers have elected to become jointly and severally liable for the entire transportation charge, and because a contrary rule would force the Commission to rely upon the unpublished and possibly unverifiable divisions of the joint rate between the American carrier and the foreign carrier. This is not the situation where the American carrier and the foreign carrier each publish rates to and from a border point where interchange occurs. In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase "but only insofar as such transportation takes place within the United States" will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country.

Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Third, the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holding support its present position. The Commission relied upon *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 ICC 139 (1934); *Newsprint Paper*

[12] See note 10, *supra*.

to Detroit, 161 ICC 63 (1930); *Simpson Co.* v. *Grand Trunk W. R. Co.*, 129 ICC 430 (1927); *Larrowe Milling Co.* v. *Chatham W. & L. E. R. Co.*, 52 ICC 145 (1919); *Iron and Steel Wire, Buffalo, N. Y. to Kitchener Ont.*, 294 ICC 515 (1955); and to a lesser extent upon *Control of Hereford Ry. Co.*, 99 ICC 7 (1925) and *Status of Napierville Junction R. Co.*, 266 ICC 471 (1946). In *Fruit Importers, Newsprint to Detroit, Simpson Co.*, and *Wire, Buffalo to Kitchener*, the assailed rates were joint rates over which the Commission's jurisdiction is conceded. In *Larrowe Milling* the shipper assailed carload minima concurred in by both the Canadian and American carriers, thus presenting a situation analogous to a joint rate. In *Control of Hereford Ry. Co.*, a case involving the application of an American carrier to acquire control of a line 52.85 miles in length of which all but 0.67 miles were in Canada, and to abandon operations along this line, the Commission held it had authority to approve the acquisition under Section 5(a) but that its abandonment jurisdiction extended only to the trackage within the United States. In *Napierville Junction* the Commission held that a Canadian line whose trackage ended at the international boundary was not subject to the provisions of the Act even though its crews and equipment did conduct some operations on the one mile of track in the United States between the border and Rouses Point, N.Y. These last two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case.

Not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination international rate.[13] In *Albee*

Appendix A

Fruit Co. v. *Atlantic Coast Line R. Co.*, 293 ICC 785, Montreal consignees of fresh fruit from the Florida area filed complaints as to the combination rates made over Rouses Point, N.Y. In limiting its jurisdiction the Commission stated: "The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." *Hoffman-Taff, Inc.* v. *St. Louis S. F. R. Co.*, 279 ICC 710, 712 (1950) involved rates on shipments of aqua ammoniac from originating points in Canada to Springfield, Missouri. The rates were combination rates made over Detroit and Port Huron, and apparently the complaint attacked only the Canadian por-

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[13] *Watab Paper Co.* v. *Canadian National R. Co.*, 152 ICC 265 (1929) appears to be the single exception to the above statement. Watab involved shipments of pulpwood from Manitoba points of origin approximately thirty miles north of the border to a consignee in central Minnesota. After reaching the interchange point of Warroad, Minnesota, approximately six miles south of the border, the shipments were misrouted so as not to travel along the least expensive routing. In computing damages the Commission held that the factor from the Manitoba points of origin to Warroad was unreasonable. Jurisdiction to make such a holding was premised upon a Section 4 violation resulting from the fact that the rates from the Manitoba points of origin to Warroad were greater than the rate from the points of origin to International Falls, Minnesota, a point approximately seventy-five miles east of Warroad and a point which shipments from the points of origin could reach only by routing through Warroad. However, the Commission recognized that these circumstances were most unusual, stating at p. 268: "Where the rate from a point in Canada to a destination in the United States is *based on a combination of the rates to and from a border point within the United States, our jurisdiction ordinarily extends only to the rate within the United States.*" [Italics supplied.]

tion of the rates. The Commission stated: "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, which for all practical purposes are international border points, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction." In *E. J. Stanton* v. *Atchison T. & S. F. R. Co.*, 258 ICC 315 (1944) the Commission, after holding the American factors to be reasonable, refused to pass upon the Canadian factors of combination rates on the shipment of lumber from Los Angeles to the Maritime Provinces made over Port Huron, Detroit, Buffalo, and Rouses Point. For cases of similar import see *Dow Chemical Co.* v. *Alton & S. R. Co.*, 284 ICC 365 (1952); *Crelinsten* v. *Railway Express*, 201 ICC 283 (1934); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520 (1932). In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395-97 (1956); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 351-52 (1941).

It is contended that support for the Commission's present interpretation may be found in *Great Northern R. Co.* v. *Sullivan*, 294 U.S. 458 (1935). The *Sullivan* case involved the complaint of a North Dakota consignee of lignite mined in Alberta, Canada. The shipments moved on a combination

rate made over an international-border point located within the United States. The Commission awarded reparations upon a finding that the American factor was unreasonable. The Supreme Court reversed, holding that an award of reparations was improper without a finding that the entire rate, i.e., the sum of the American and Canadian factors, was excessive. Thus it is argued that *Sullivan* equated combination international rates with joint international rates for purposes of the Commission's jurisdiction. We believe that a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury. As we read the case the Court held that a complainant seeking reparations by attacking the American factor of a combination international rate must not only demonstrate the unreasonableness of the factor over which the Commission has jurisdiction but also the unreasonableness of the sum of the combined rates.

Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points. This argument is unpersuasive. The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers. If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 ICC 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 ICC 575 (1926). We merely hold that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United

States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate.

The orders described in note 2, *supra*, are annulled and set aside, and the cause is remanded for further proceedings in conformity with this opinion.

STERRY R. WATERMAN
U.S. Circuit Judge.

I concur:

JAMES T. FOLEY
U.S. District Judge.

I concur:

ERNEST W. GIBSON
U.S. District Judge.

APPENDIX B

28224

INTERSTATE COMMERCE COMMISSION

No. 30846 [1]

THERMOID COMPANY, SOUTHERN DIVISION v. BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Decided May 7, 1958

1. Rates on crude asbestos and asbestos fiber from Danville, St. Malachie, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Quebec, Canada, to Charlotte, Davidson, and Marshville, N. C., and North Charleston, S. C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and for the future found to be unduly prejudicial. Reparation awarded, and defendants required to remove the unlawfulness found to exist.
2. Commission found without jurisdiction to prescribe just and reasonable joint through international rates for the future. Prior findings, 288 I.C.C. 795, modified.

Appearances as shown in prior report, and:

E. B. Ussery, Harvey L. Golden, and *H. V. Fleming* for complainants.

J. Edgar McDonald, R. C. Gill, Donal L. Turkal, James L. Tapley, and *J. Raymond Hoover* for defendants.

REPORT [2] OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by the defendants to the report proposed by the examiner, the complainants replied, and

[1] This report embraces also No. 31683, Raybestos-Manhattan, Inc., General Asbestos & Rubber Division *v.* Baltimore & Ohio Railroad Company et al.; No. 31684, Thermoid Company, Southern Division *v.* Same; No. 31685, Union Asbestos & Rubber Company *v.* Same; and No. 31686, Carolina Asbestos Company *v.* Same.

[2] On further hearing in No. 30846.

the issues were orally argued before us. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings on conclusions have been considered and found not justified.

In the title proceeding, the complainant, a corporation engaged at Charlotte, N. C., in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed on July 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte were and are unjust, unreasonable, and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

In the prior report in that proceeding, 288 I. C. C. 793, division 3 found that the assailed rates had not been shown to have been or to be unjust or unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceeding reopened for oral argument and reconsideration. Thereafter, upon petition of the complainant, the proceeding was reopened for further hearing, which was held with the embraced proceedings on a consolidated record.

In No. 31684, the same complainant, by complaint filed on December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and

unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of complainant's competitors located in those territories. We are asked to prescribe lawful rates for the future.

In No. 31683, by complaint filed on December 6, 1954, and in Nos. 31685 and 31686, by complaints filed on December 13, 1954, the complainant corporations, which likewise are engaged in the manufacture, sale, and distribution of asbestos textile products, at North Charlston, S. C., and Marshville and Davidson, N. C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Coloraine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada, to North Charleston, Marshville, and Davidson were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is engaged also in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are unlawful in like respects. These complainants ask us to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

The most important variety of asbestos commercially, of which there are several, is chrysotile, which constitutes about 95 percent of world production. Domestic production of asbestos is negligible, and American manufacturers are dependent upon foreign supplies. The most important

commercial production of asbestos of the chrysotile variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide between Danville and East Broughton, and embraces most of the origin points here concerned. Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke to Valley Junction, Quebec, Canada, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, Quebec, and St. Malachie is on the lines of the same carrier extending eastward from Diamond, Quebec, Canada. There is no record of any movement from St. Joseph, and that point will not be further considered.

On the basis of use, asbestos falls into two principal classes; namely, spinning and nonspinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Nonspinning fibers consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

The rates[3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste, and asbestos refuse and shorts. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for rate-

[3] Rates are stated in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

making purposes, and Thetford Mines and Danville will hereinafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory, and points in western territory adjacent thereto, the defendants maintain joint through international commodity rates. The rates from Danville are substantially lower than those from Thetford Mines, although the distances do not vary greatly. To southern destinations, however, no joint through rates are maintained, and the complainants are required to pay charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of a joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore to the considered destinations, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates apply on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,[4] where it connects with the

[4] By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific Railway Company. See *Canadian Pacific Ry. Co. Lease*, 105 I.C.C. 575, 576.

Canadian Pacific. These are the only rail carriers serving Newport. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Danville on shipments routed to Marshville through Rouses Point, N. Y., another customs port of entry located about 0.5 mile from the international boundary, at which the shipments are interchanged by the Canadian National with The Delaware and Hudson Railroad Corporation. Until about November 1955, shipments routed from Danville through East Alburgh, and charged at that rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, Canada, for operating convenience, and on such shipments no transportation within the United States was performed by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, are 33 cents, minimum 40,000 pounds, on crude asbestos; 28 cents, minimum 40,000 pounds, and 25 cents, minimum 80,000 pounds, on asbestos fiber, and 14 cents, minimum 60,000 pounds, and 13 cents minimum 80,000 pounds, on asbestos refuse and shorts. On asbestos waste from Thetford Mines to Newport, the proportional rates are 20 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds. On asbestos waste from Danville to Baltimore, the joint through rates are 53 cents, minimum 60,000 pounds, and 48 cents, minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35[8], minimum 50,000 pounds, asbestos fiber is rated class 35, minimum 30,000 pounds, asbestos shorts and waste are rated class

[8] Class numbers represent percentages of the docket No. 28300 first-class rates.

27.5, minimum 40,000 pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport to the same respective destinations, the class 35 rates are $1.21, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville, apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth-class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-rate routing. Because of lesser increases imposed on commodity rates than on class rates, and the adjustment of class-rate scales under our order in docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth-section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are

manufactured by concerns with plants at Ambler, Pa., Manville, N. J., North Brookfield, Mass., Chicago, Ill., Meredith, N. H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cincinnati, Ohio, Rutherford, N. J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of 0.1 to 0.25 cent per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint through international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents, and later 10 cents, over the Sherbrooke rates. In September 1954, after a few rates on asbestos fiber had been established with an 80,000-pound minimum to a limited number of points, similar rates were published to numerous destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the complainants do not have the advantage of such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds.

The table in the appendix hereto compares representative applicable joint through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston. It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. As-

bestos producers on the Quebec Central, on shipments to points in official territory, absorb these rates differences, so that for all practical purposes receivers in that territory receive the benefit of the Canadian National rates. The complainants raise no issue concerning these rate differences as such, but ask that, if relief is afforded them, similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distance. For example, the rates on asbestos fiber from Danville to Ogdensburg, N. Y., 209 miles, and to Winchester, Va., 700 miles, are the same as the rates to Ambler and Manville, 68 cents, minimum 40,000 pounds and 61 cents, minimum 80,000 pounds, and the same rates apply to practically all points in trunkline territory from New York, N. Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thetford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1,024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1,026 miles, and to Hanibal, Mo., 1,149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08, minimum 60,000 pounds, and $1.07, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler

and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from Thetford Mines, the combination rates to Davidson are $1.14, minimum 60,000 pounds, and $1.12, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago, and 67 cents and 60 cents to St. Louis.

Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the docket No. 15879 class rates formerly prescribed for application within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official-territory points with the class rates and with combination rates constructed as are the rates to the complainants' destinations. For example, on crude asbestos from Thetford Mines to Ambler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate $1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

Asbestos is produced at Matheson, Ontario, and Vancouver, British Columbia, Canada. The rates on crude asbestos and asbestos fiber from Matheson to Chicago and

St. Louis are the same as those from Danville, for comparable distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the considered Carolina destinations, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana points; $1.01 to group D embracing Chicago; and 93 cents to group E-4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destirations, the rate to group K was reduced to $1.38. This rate was likewise made applicable to group A points, and the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson, Calif., for distances approximately 2.5 times those to the Carolina destinations, on asbestos fiber are $1.72 and $1.89, minimum 60,000 pounds, and $1.28 and $1.45, minimum 80,000 pounds; on asbestos waste, $1.13 and $1.27, minimum 80,000 pounds; and on asbestos refuse and shorts, $1.13 and $1.22, minimum 80,000 pounds.

The complainants have lost ground in recent years in their efforts to compete in the sale of asbestos textile products, particularly since the readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000 pounds. The proportion of the industrywide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first 3 months of 1955. In 1949 this complaint marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 that percentage dropped to 80.2. Raybestos-Manhattan, Inc., experienced a

decline in its proportion of total industry production from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952, the production of asbestos textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production. By 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has generally maintained its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official-territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles has been confined to North Carolina and South Carolina by reason of the competition from official-territory producers, and even there the competition is keen.

In April 1949, the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte, but the proposal was disapproved by the other lines. The defendants show that traditionally rates from Canadian origins to points in the South are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction in these proceedings only over the rate factors applicable

southbound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the South, with which they compare favorably. They contend, also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian carriers, over their lines from border points in Michigan, can effect delivery without participation of United States carriers. They admit, however, that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, particularly upon the establishment of the 80,000-pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500 to $1,500 per ton, milled asbestos spinning fibers at $300 to $525 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75 to $80 a ton, and assert that, in their view, the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories*, 299 I. C. C. 375, and were there found not shown to be just and reasonable, and ordered canceled. The defendants show also, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of the shipments to the Carolina

destinations are of spinning grades, that the reverse is true in official and western territories, and that there are few, if any, shipments of spinning fibers from these origins to points west of Akron, Ohio. Based on the latter circumstances, it was indicated at the hearing that a revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor-carrier competition, but the record is clear that the present rate structure was effected long before motor competition was a factor.

The complainants contend that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the prescription of joint through rates from the Caandian origins to their destinations reasonably related to the rate structure maintained to official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.

Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear

alternative with respect to their participation in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I. C. C. 15. We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.

The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary. In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, 143, the defendants challenged our jurisdiction to pass upon the reasonableness of joint through rates to

Canada because they had published just and reasonable rates to Rouses Point, regarded generally as a Canadian border point. Division 4 pointed out, however, that the rates to Rouses Point were local rates and that if, as the defendants contended, they were intended to apply to the Canadian border, they should have been so published in clear and unequivocal terms. In *Newsprint Paper to Detroit*, 161 I.C.C. 637, division 5 stated, at page 639:

> It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transporation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was in violation of section 6 of the act. We have under the circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom.

In *Charles S. Simpson Co.* v. *Grand Trunk W. Ry. Co.*, 129 I.C.C. 430, division 4 considered the reasonableness of refrigeration charges from Port Huron, Mich., an interchange point between the Grand Trunk Western and the Canadian National, to Toronto, Ontario, and Montreal, Quebec, Canada, and found them not unreasonable. In *Larrowe Milling Co.* v. *Chatham, W. & L.E.R. Co.*, 52 I.C.C. 145, which involved the charges on beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey, reparation was awarded against the carriers that performed the haul within the United States, although it was stated that the haul performed by the Michigan Central Railroad Company to Suspension Bridge, N. Y., was almost wholly without the boundaries of the United States. In *Iron or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 I.C.C. 515, the respondents contended that this Commission should not take jurisdiction over rates which included hauls of only 6.04 miles within the United States

to the Canadian border, the distance therefrom to the Canadian destination approximating 123 miles. The contention was rejected by division 3.

In other proceedings not concerned with the matter of rates, we have noted jurisdiction over that portion of a rail line extending south of the Canadian border even though the haul within the United States was small as compared with the total mileage. In *Hereford Ry. Co. Control*, 99 I.C.C. 7, division 4 authorized the Maine Central Railroad Company to acquire control of the Hereford Railway Company, a Canadian carrier 52.85 miles long, and to abandon that portion of the line extending 0.67 mile into Coos County, N. H. In *Status of Napierville Junction Ry. Co.*, 266 I.C.C. 471, it was found that the respondent was not a common carrier subject to part I of the act since its operations stopped at the Canadian-United States boundary, and the haul therefrom to Rouses Point, 1.1 miles, was performed by The Delaware and Hudson Railroad Corporation.

The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.

As above indicated, the defendants maintain joint through commodity rates from the considered Canadian origins to numerous points in official territory. The rates shown in the appendix hereto to Ambler apply to 26 destinations on crude asbestos for distances ranging from 377 to 678 miles, and averaging 513 miles, from Danville, and from 455 to 719 miles, averaging 553 miles, from Thetford Mines; and on asbestos fiber to over 150 destinations for distances ranging from 209 to 710 miles, averaging 493 miles, from

Danville, and from 314 to 788 miles, averaging 545 miles, from Thetford Mines. The range in distances on asbestos refuse and shorts is about the same as on asbestos fiber. Thus, it appears that Ambler, where asbestos products are manufactured (529 miles from Danville and 570 miles from Thetford Mines), is a representative destination in these groupings.

From Thetford Mines to Ambler, the commodity rates of 97 cents, minimum 40,000 pounds, on crude asbestos, 86 cents, minimum 40,000 pounds, on asbestos fiber, 58 cents, minimum 60,000 pounds, on refuse and shorts, and 62 cents, minimum 60,000 pounds, on waste are about 86, 80, 76, and 81 percent, respectively, of what the rates would be if constructed on a combination basis in a manner similar to that used in constructing the rates to the considered Carolina destinations. The 80,000-pound commodity rates to Ambler on asbestos fiber, refuse and shorts, and waste are approximately 90 percent of those subject to the lower minimum weights. The rates herein found just and reasonable to Carolina destinations are constructed on a substantially similar basis. For example, the rate of $1.33 found just and reasonable on crude asbestos, minimum 40,000 pounds, from Thetford Mines to Charlotte is about 86 percent of the combination rate of $1.54. Moreover, the rates herein found just and reasonable to the Carolina destinations are substantially higher, distance considered, than the rates to numerous destinations in official territory. See, for example, the rates shown in the appendix hereto of $1.14, minimum 40,000 pounds, and $1.04, minimum 80,000 pounds, on asbestos fiber from Thetford Mines to Kirkwood (St. Louis), Mo., 1,198 miles, as compared with respective rates of $1.20 and $1.10 found reasonable herein on the same commodity from the same origin to Charlotte, 1,083 miles.

It is clear that the complainants' competitors at Ambler and other destinations in official territory are being un-

duly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. The rates from the Quebec Central mines generally are on a higher level to points in official territory than those from the Canadian National mines, and appear to represent reasonable maxima. Equitable treatment of the complainants would require, however, that they be accorded rate levels from the Canadian National mines which are relatively the same as those available to receivers in official territory in order to remove the undue preference and prejudice found to exist. As stated, we have no authority to prescribe for the future joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on international traffic to the extent that the transportation takes place within the United States.

We find that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, and Warwick, rates of $1.33, minimum 40,000 pounds, on crude asbestos, and $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, on asbestos fiber to Charlotte; and from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick of $1.33 to Davidson and Marshville and $1.41 to North Charleston on crude asbestos, minimum 40,000 pounds, of $1.20 minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, to Davidson and Marshville, and $1.27, minimum 40,000 pounds, and $1.16, minimum 80,000 pounds, to North Charleston on asbestos fiber; and to Davidson of 82 cents, minimum 60,000 pounds, and 74 cents, minimum 80,000

pounds, on asbestos refuse and shorts, and of 88 cents, minimum 60,000 pounds, and 80 cents, minimum 80,000 pounds, on asbestos waste.

We further find that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, and destinations taking the same rates, by the following amounts: On crude asbestos 36 cents, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 44 cents, minimum 40,000 pounds, from the latter origins to North Charleston; on asbestos fiber, 34 cents, minimum 40,000 pounds, and 31 cents, minimum 80,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 41 cents, minimum 40,000 pounds, and 37 cents, minimum 80,000 pounds, from the latter origins to North Charleston; and to Davidson from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, 24 cents, minimum 60,000 pounds, and 21 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and 21 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds, on asbestos waste.

We further find that on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will

SEP 22 1960
JAMES R. BROWNING, Clerk

No. 257

Supreme Court of the United States

October Term, 1960

H. K. PORTER COMPANY, INC., *ET AL.*, APPELLANTS,

vs.

CENTRAL VERMONT RAILWAY, INC., *ET AL.*,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF H. K. PORTER COMPANY, INC., ET AL., APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM

E. B. USSERY,
608 Security Federal Building,
Columbia 1, South Carolina,
Attorney for Appellants.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

We further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, were damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases herein found to have been just and reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In instances where shipments from Danville and Warwick were interchanged by the Canadian National at St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp.* v. *Holton I.-U. R. Co.*, 164 I.C.C. 505, 510.

To all of the rates resulting from the findings herein may be added the applicable general increases authorized on and subsequent to March 12, 1951.

An order will be entered vacating the prior order in No. 30846, and requiring the removal of the undue preference and prejudice found to exist.

CHAIRMAN FREAS dissents.

COMMISSIONERS MITCHELL and GOFF did not participate in the disposition of this proceeding.

Appendix B

APPENDIX

To—	Crude asbestos				Asbestos fiber			
	From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada		From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada	
	Short-line distance	Rates,[1] minimum 40,000 pounds	Short-line distance	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds	Rates,[1] minimum 40,000 pounds	Rates, minimum 80,000 pounds
	Miles	*Cents*	*Miles*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Manville, N. J.	480	68	521	97	68	61	86	77
Ambler, Pa.	529	68	570	97	68	61	86	77
Chicago, Ill.	907	103	987	132	85	77	101	91
Kirkwood (St. Louis), Mo.	1,118	.....	1,198	.....	97	87	114	102
Richmond, Va.	782	.....	823	.....	100	90	118	106
Charlotte, N. C.	1,042	150	1,072	154	134	131	134	131
Davidson, N. C.	1,631	149	1,109	152	134	131	134	131
Marshville, N. C.	1,068	152	1,083	156	136	133	136	133
North Charleston, S. C.	1,175	159	1,216	163	154	151	158	155

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 50,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 50,000 pounds beyond.

Appendix B

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 7th day of May, A.D. 1958

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted

by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and the prior report in No. 30846, 288 I.C.C. 793, are hereby referred to and made a part hereof; and the Commission having found in the report of even date that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, in carloads, from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, Quebec, Canada, to certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants and unduly preferential of the complainants' competitors to the extent indicated in said report of even date:

It is ordered, That the defendants named in the complaints, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue prejudice and preference referred to in the preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

And it is further ordered, That the order of May 25, 1953, in No. 30846, be, and it is hereby, vacated and set aside, and that this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL]

HAROLD D. McCOY,
Secretary.

Appendix B

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 11th day of March, A.D., 1959

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

It appearing, That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2,

1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

It further appearing, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

It is ordered, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

It is further ordered, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

And it is further ordered, That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the findings of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

[SEAL]

HAROLD D. McCOY,
Secretary.

APPENDIX C

Statutes Involved.

Section 1(1) (a) and (2) (49 U. S. C. § 1(1)(a) and (2)).

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment;

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

* * * *

Section 1(5) (49 U.S.C. § 1(5)).

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Appendix C.

Section 3(1) (49 U.S.C. § 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * *

APPENDIX D

Cases in which the Commission declined to take jurisdiction over the foreign factor of combination rates made over border points within the United States.

Carey Mfg. Co. v. *G. T. W. Ry. Co.* (1915), 36 I.C.C. 203, 206.

Big Basin Lumber Co. v. *S. P. Co.* (1916), 37 I.C.C. 730, 737.

Arizona Lumber & Timber Co. v. *A.E. R.R. Co.* (1925), 96 I.C.C. 203, 206.

Thannhauser & Co. v. *Southern Pac. Co.* (1929), 159 I.C.C. 747.

Fruit Importers v. *Atlantic Coast Line R. Co.* (1932), 188 I.C.C. 520, 524.

M. Crelinsten & Sons v. *Railway Express Agency, Inc.* (1934), 201 I.C.C. 284, 286.

E. J. Stanton & Son v. *Atchison, T. & S. F. Ry. Co.* (1944), 258 I.C.C. 315, 318.

Hoffman-Taff, Inc. v. *St. Louis-S. F. Ry. Co.* (1950), 279 I.C.C. 710, 712.

Dow Chemical Co. v. *Alton & S. R.* (1952), 284 I.C.C. 365, 370.

Elliott Packing Co. v. *Duluth, W. & P. Ry. Co.* (1954), 292 I.C.C. 12, 13.

Albee Fruit Co. v. *Atlantic Cost Line R. Co.* (1955), 293 I.C.C. 785, 787.

Endicott-Johnson Corp. v. *Akron, C. & Y. R. Co.* (1957), 300 I.C.C. 373, 384.

Conrad Fafard, Inc. v. *Canadian National Rys.* (1957), 302 I.C.C. 163.

****Yellow Jacket Boat Co., Inc.* v. *Atchison, T. & S. F. Ry. Co.* (1958), 302 I.C.C. 657; 305 I.C.C. 113.

*****United States Overseas Airlines, Inc.* v. *P.-R. S. Lines* (1960), 309 I.C.C. 411.

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*Highgate Springs, Vt., the United States port of exit, was 3.5 miles south of the international boundary.

****** Decided subsequent to the decision of the commission in the instant case.

EXHIBIT E

Joint rate cases in which the Commission declined to take jurisdiction over foreign railroads and the transportation they performed on traffic interchanged with American railroads at border points within the United States.

Black Horse Tobacco Co. v. I. C. R. R. Co. (1910), 17 I.C.C. Rep. 588.

*International Paper Co. v. D. & H. Co. (1915), 33 I.C.C. 270.

Fairmont Creamery Co. v. Adams Express Co. (1917), 43 I.C.C. 724.

Booth Fisheries Co. v. American Express Co. (1917), 45 I.C.C. 363.

International Nickel Co. v. Director General (1922), 66 I.C.C. 627.

Spanish River Pulp & Paper Mills v. A. & W. Ry. Co., 113 I.C.C. 343; 126 I.C.C. 251.

**Ontario Paper Co. v. C. N. Rys. (1924), 95 I.C.C. 66; 102 I.C.C. 365.

Cyanamid and Cyanide From Niagara Falls (1929), 151 I.C.C. 207; 155 I.C.C. 488.

†Lewis-Simas-Jones Co. v. S. P. Co., 102 I.C.C. 245.

Celon Co. v. Canadian Pac. Ry. Co. (1940), 238 I.C.C. 407.

Dallas Produce Co. v. Atchison, T. & S. F. Ry. Co. (1950), 278 I.C.C. 746.

Chas. H. Lilly Co. v. Great Northern Ry. Co. (1956), 298 I.C.C. 407.

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* Massena Springs, N. Y., one of the Canadian-American railroad interchange points, was "about 20 miles from the boundary line via the route of movement."

**Ultimately considered by this Court in *News Syndicate Co. v. N. Y. C. R. R.* (1927), 275 U. S. 179.

†Ultimately considered by this Court in *Lewis, Etc. Co. v. Southern Pac. Co.*, 283 U. S. 654.